

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

IN THE MATTER OF:)	
)	CG Docket No. 02-278
Petition of Foot Levelers, Inc. for)	
Retroactive Waiver of Section)	CG Docket No. 05-338
64.1200(a)(4)(iv) of the Commission's Rules)	

**REPLY IN SUPPORT OF FOOT LEVELERS, INC.'S PETITION FOR RETROACTIVE
WAIVER**

Foot Levelers, Inc. ("Foot Levelers") by counsel, respectfully submits this reply in support of its petition for a retroactive waiver of 47 C.F.R. Section 64.1200(a)(4)(iv) (the "Opt-out Requirement") pursuant to the Federal Communications Commission's (the "Commission's") Order issued on October 30, 2014,¹ Section 1.3 of the Commission's rules and the Consumer and Governmental Affairs Bureau's (the "Bureau's") Orders issued on August 28, 2015, December 9, 2015, and November 2, 2016.²

INTRODUCTION

The sole opposition to Foot Levelers' waiver petition comes from a plaintiff ("Commenter") represented by a serial TCPA class action filer in a lawsuit against Foot Levelers. *See* TCPA Pls' Comments on Petitions for Retroactive Waiver filed by Chester Limited, Inc. and Foot Levelers, Inc. (Feb. 23, 2017) ("Comments"). The arguments raised in that opposition are not unique to Foot Levelers' petition. Indeed, the Bureau has considered and rejected the same arguments numerous times, most recently in its November 2, 2016 Order. *See*

¹ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, Order, 29 FCC Rcd. 13998 (rel. October 30, 2014) (the "2014 Anda Commission Order").

² *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, Order, CG Docket Nos. 02-278, 05-338, FCC 15-976 (rel. Aug. 28, 2015), 30 FCC Rcd 8598; *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, Order, CO Docket Nos. 02-278, 05-338, FCC 15-1402 1112 (rel. Dec. 9, 2015), 30 FCC Rcd 14057; *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, Order, CO Docket Nos. 02-278, 05-338, DA 16-1242 (Nov. 2, 2016).

FCC Order DA 16-1242 (November 2, 2016). The Bureau should reject the Commenter's arguments and grant Foot Levelers' petition for the same reason it has granted numerous other petitions and for the reasons stated in Foot Levelers' petition: there is good cause for granting a waiver to Foot Levelers because special circumstances warrant a deviation from the general rule regarding the Opt-out Requirement and the waiver would better serve the public interest than would application of the rule. *See* Petition of Foot Levelers, Inc. for Retroactive Waiver at 4-5 (February 2, 2017).

ARGUMENT

In its waiver petition, Foot Levelers detailed the applicable law and Commission orders relating to facsimile transmissions and the Opt-out Requirement, and identified prior proceedings in which the Bureau has granted more than one hundred waivers of applicants similarly-situated to Foot Levelers because those waivers were in the public interest and supported by good cause. *See* Petition of Foot Levelers, Inc. for Retroactive Waiver at 4 (February 2, 2017). Foot Levelers noted that the Commission had found that there was "industry-wide confusion" regarding whether fax ads sent with recipient consent must include an opt-out notice,³ and that this confusion stemmed from (1) the language of a footnote in a 2006 Commission Order regarding the opt-out rule,⁴ and (2) the language of the notice issued prior to the rule that did not make explicit the Commission's intent to apply an opt-out requirement to solicited fax ads. *See id.* at 5. Further, Foot Levelers asserted that it was reasonably confused as to whether the solicited

³ *See In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd 8598 (Aug. 28, 2015), citing *2014 Anda Commission Order* paras. 24-26.

⁴ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787 (2006) ("*Junk Fax Order*").

faxes it transmitted, or those that were transmitted on its behalf, were required to satisfy the Opt-Out Requirements prior to the Commission's issuance of the *2014 Anda Commission Order*. *Id.*

Foot Levelers also explained how the public interest would be served by the granting of a waiver in this case. *Id.* at 5-6. The Commission has previously found that the public interest is not served by subjecting businesses that were reasonably confused by the Opt-out Requirement to a strict application of that requirement when “failure to comply with the rule — which ... could be the result of reasonable confusion or misplaced confidence — could subject parties to potentially substantial damages.”⁵ In its petition, Foot Levelers detailed the potential substantial liability it faces in a putative class action lawsuit pending against it alleging violations of the TCPA's Junk Fax Prevention Act and Commission regulations promulgated thereunder.⁶ *See* Petition of Foot Levelers, Inc. for Retroactive Waiver at 6 (February 2, 2017). Therefore, Foot Levelers is similarly-situated to the prior waiver recipients, and the public interest would be served by granting it a waiver. *Id.* at 6-7.

In response to Foot Levelers' petition, Commenter makes two arguments that the Bureau has already considered and rejected. First, Commenter argues that the Commission “has no authority to waive violations of the regulations prescribed under the TCPA in a private right of action.” *See* Comments at 3. This is the same argument raised numerous times prior to the release of the *2014 Anda Commission Order*, and the Bureau has rejected it on multiple occasions, most recently on November 2, 2016. *See* FCC Order DA 16-1242 at 7-8 (November 2, 2016) (“the mere fact that the TCPA allows for private rights of action to enforce rule violations does not undercut the Commission's authority, as the expert agency, to define the scope of when and how its rules apply”).

⁵ *2014 Anda Commission Order*, 29 FCC Rcd at 14010-11, para. 27.

⁶ *See* Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005); *see also* *Junk Fax Order*.

Second, Commenter argues that the record contemporaneous with the *Junk Fax Order* does not support a presumption of confusion over the applicability of the Opt-out Requirement and that there is no evidence there was industry confusion regarding the *Junk Fax Order*. See Comments at 4-10. The Bureau has considered and rejected these arguments as well. See FCC Order DA 16-1242 at 8-9 (November 2, 2016). Like previous petitions the Bureau has granted, Foot Levelers “reference[d] the contradictory language in the Commission’s *Junk Fax Order*, thus qualifying [it] for the presumption of confusion or misplaced confidence articulated by the Commission.” FCC Order DA 16-1242 at 9 (November 2, 2016); see also Petition of Foot Levelers, Inc. for Retroactive Waiver at 3-4 (February 2, 2017). In addition, Foot Levelers argued that it was reasonably confused whether the faxes it sent or that were sent on its behalf were required to comply with the Opt-Out Requirements before the Commission issued the 2014 *Anda Commission Order*. *Id.* at 5. Thus, the reasoning the Bureau used in granting prior petitions, most recently on November 2, 2016, applies equally to Foot Levelers.⁷

CONCLUSION

In short, Foot Levelers has demonstrated that it is similarly-situated to those parties to whom the Bureau has granted a retroactive waiver. Commenter does not argue otherwise. Foot Levelers has demonstrated good cause for a deviation from the general rule and has shown that the granting of a waiver is in the public interest. The Bureau has considered and dismissed Commenter’s waiver opposition remarks in connection with numerous previous petitions and should do so here as well. Accordingly, for the reasons stated above and in its petition, Foot

⁷ Notably, Commenter concedes that it is “not arguing that each petitioner must show that *it* was actually confused to obtain a waiver under the October 30, 2014 Order.” Comments at 8 (emphasis in original). The reason for this concession is plain: the Bureau has made clear that it “reject[s] arguments that the Commission made actual, specific claims of confusion a requirement to obtain a waiver. The Commission did not require petitioners to plead specific, detailed grounds for individual confusion, and we do not impose such a requirement now.” FCC Order DA 16-1242 at 9 (November 2, 2016).

Levelers respectfully requests that it be granted a limited retroactive waiver of Section 64.1200(a)(4)(iv) with respect to facsimiles that were transmitted by Foot Levelers, or on Foot Levelers' behalf, prior to April 30, 2015, with the prior express invitation or permission of the recipients or their agents but without opt-out notices or with opt-out notices that did not conform to the requirements of the Opt-out Requirement.

Respectfully submitted,

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